Supreme Court, U.S.

(1)

98 487 SEP 1 2 1998

No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1997

MARITIME OVERSEAS CORPORATION,

Petitioner,

v.

RICHARD ELLIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Texas

PETITION FOR A WRIT OF CERTIORARI

THOMAS B. GREENE III
Counsel of Record
WARE, SNOW, FOGEL, JACKSON & GREENE, P.C.
1111 Bagby, 49th Floor
Houston, Texas 77002
(713) 659-6400

JOE R. GREENHILL
BAKER & BOTTS, L.L.P.
98 San Jacinto Blvd.
Austin, Texas 78701
(512) 322-2517
Of Counsel

LINDA BROOCKS
SALLY MANN ROMANO
OGDEN, GIBSON, WHITE & BROOCKS, L.L.P.
2100 Pennzoil South Tower
711 Louisiana
Houston, Texas 77002
(713) 844-3000
Counsel for Petitioner

40 pp

QUESTIONS PRESENTED

Question I

The Jones Act incorporates the Federal Employers' Liability Act (FELA), which provides that an employer shall be liable for "injury or death resulting in whole or in part from the [employer's] negligence . . . ."

This statutory provision reduces a plaintiff's burden of proof with respect to proving a causal connection between an employer's negligence and the event sued upon.

Does this provision also reduce the plaintiff's burden of proof with respect to establishing a causal connection between the event sued upon and the injuries sustained by the plaintiff?

Question II

Does *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), preclude post-trial review of a verdict based on unreliable expert testimony?

LIST OF PARTIES PURSUANT TO RULE 29.6

All parties to the proceeding in the Texas Supreme Court appear in the caption of the case.

Petitioner Maritime Overseas Corporation is a privately-held New York corporation. It has no parent company and no nonwholly-owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES PURSUANT TO RULE 29.6 ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 6

I. THIS COURT SHOULD CLARIFY THAT A JONES ACT PLAINTIFF MUST ESTABLISH TWO CAUSAL CONNECTIONS 6

A. The paternalistic judicial deference given to Jones Act claimants arises from a gravely anachronistic doctrine 9

B. The "featherweight" burden of proof applies only to the issue of the defendant's liability ... 11

C. This Court should clarify that the second causal nexus must be proved by a preponderance of the evidence 14

D. The decision below and a significant number of Jones Act cases conflict with the "reasonable medical probability" standard 17

Page

E. The issue is important 20

II. THE RIGIDITY OF THE TEXAS SUPREME COURT'S RULING WRENCHES *DAUBERT* FROM ITS MOORINGS AND INSULATES SPECULATIVE EXPERT TESTIMONY 23

A. Texas has adopted all federal standards for expert testimony 24

B. The rules of evidence and *Daubert* disfavor wholesale exclusion of expert testimony, sanctioning traditional remedies for attacking "shaky but admissible" expert testimony 25

C. The issue is important 26

CONCLUSION 28

APPENDIX .....VOLUME II

TABLE OF AUTHORITIES

CASES — Page

Atchison, Topeka & Santa Fe Ry. Co. v. Buell,
480 U.S. 557 (1987) 8
Boeing Co. v. Shipman,
411 F.2d 365 (5th Cir. 1969) (en banc),
overruled by Gautreaux v. Scurlock Marine, Inc.,
107 F.3d 331 (5th Cir. 1997) (en banc) 18
Brock v. Merrell Dow Pharmaceuticals, Inc.,
874 F.2d 307 (5th Cir.),
modified on reh'g, 884 F.2d 166 (5th Cir. 1989),
cert. denied, 494 U.S. 1046 (1990) 17, 18, 19, 27
Brown v. Lull,
4 F. Cas. 407 (C.C.D. Mass. 1836) (No. 2018) 11
Burroughs Wellcome Co. v. Crye,
907 S.W.2d 497 (Tex. 1995) 22
Cella v. United States,
998 F.2d 418 (7th Cir. 1993) 16
Chisholm v. Sabine Towing & Transp.,
679 F.2d 60 (5th Cir. 1982) 13, 15
Christophersen v. Allied-Signal Corp.,
939 F.2d 1106 (5th Cir. 1991),
cert. denied, 503 U.S. 912 (1992) 19, 27
Claar v. Burlington N. R.R.,
29 F.3d 499 (9th Cir. 1994) 14, 19, 24
Consolidated Rail Corp. v. Gottshall,
512 U.S. 532 (1994) 8, 16
Cosmopolitan Shipping Co. v. McAllister,
337 U.S. 783 (1949) 9
Dallas Ry. & Terminal Co. v. Gossett,
294 S.W.2d 377 (Tex. 1956) 25
Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579 (1993) ..... *passim*

Diebold v. Moore McCormack Bulk Transp. Lines, Inc.,
805 F.2d 55 (2d Cir. 1986) 15
E.I. du Pont de Nemours & Co. v. Robinson,
923 S.W.2d 549 (Tex. 1995) 24
Exxon Co., U.S.A. v. Sofec, Inc.,
517 U.S. 830 (1996) 12
Ferguson v. Moore-McCormack Lines, Inc.,
352 U.S. 521 (1957) 8
Frye v. United States,
293 F. 1013 (D.C. Cir. 1923) 25
Garrett v. Moore-McCormack Co.,
317 U.S. 239 (1942) 9
Gautreaux v. Scurlock Marine, Inc.,
107 F.3d 331 (5th Cir. 1997) 7, 8, 18
Gianfala v. Texas Co.,
350 U.S. 879 (1955) 10
Gideon v. Johns-Manville Sales Corp.,
761 F.2d 1129 (5th Cir. 1985) 13, 17, 18
Hayes v. Raytheon,
808 F. Supp. 1326 (N.D. Ill. 1992) 17
Henry v. Phillips,
151 S.W. 533 (Tex. 1912) 25
Hines v. Consol. Rail Corp.,
926 F.2d 262 (3d Cir. 1991) 18
Hume v. Moore-McCormack Lines, Inc.,
121 F.2d 336 (2d. Cir.),
cert. denied, 314 U.S. 684 (1941) 9
In re Hechinger,
890 F.2d 202 (9th Cir. 1989),
cert. denied, 498 U.S. 848 (1990) 8
In re Paoli R. Yard PCB Litig.,
916 F.2d 829 (3d Cir. 1990),
cert. denied sub nom.
General Elec. Co. v. Knight, 499 U.S. 961 (1991) 18

Insurance Co. of N. Am. v. Myers,
411 S.W.2d 710 (Tex. 1966) 17
Kelcey v. Tankers Co.,
217 F.2d 541(2d Cir. 1954) 28
Knowles v. Burlington N. R. Co.,
856 P.2d 1352 (Kan. App. 1993) 16
Marbled Murrelet v. Babbitt,
83 F.3d 1060 (9th Cir. 1996),
cert. denied, 117 S. Ct. 942 (1997) 23, 26
Maritime Overseas Corp. v. Ellis,
1992 Tex. App. LEXIS 3227
(Tex. App.–Houston [14th Dist.] 1992),
aff'd in part, rev'd in part,
886 S.W.2d 780 (Tex. App.–Houston
[14th Dist.] 1994) (en banc), *aff'd*,
971 S.W.2d 402 (Tex. 1998) ..... *passim*
Martin v. Herzog,
126 N.E. 814 (N.Y. 1920) 12
Mayhew v. Bell S.S. Co.,
917 F.2d 961 (6th Cir. 1990) 17
Metro-North Commuter R.R. Co. v. Buckley,
117 S. Ct. 2113 (1997) 8, 21
Miles v. Apex Marine Corp.,
498 U.S. 19 (1990) 22
Moody v. Maine Cent. R. Co.,
823 F.2d 693 (1st Cir. 1987) 16
Morgan v. Compugraphic Corp.,
675 S.W.2d 729 (Tex. 1984) 7, 13, 22
Peymann v. Perini Corp.,
507 F.2d 1318 (1st Cir. 1974),
cert. denied, 421 U.S. 914 (1975) 15
Reyes v. Vantage S.S. Co., Inc.,
558 F.2d 238 (5th Cir. 1977) 15

Rogers v. Missouri Pac. R.R.,
352 U.S. 500 (1957) 6, 8, 13
Rosen v. Ciba-Geigy Corp.,
78 F.3d 316 (7th Cir.),
cert. denied, 117 S. Ct. 73 (1996) 19
Salem v. United States Lines Co.,
370 U.S. 31 (1962) 15
Schaefer v. Texas Employers' Ins. Ass'n,
612 S.W.2d 199 (Tex. 1980) 25
Sentilles v. Inter-Caribbean Corp.,
361 U.S. 107 (1959) 14
Smith v. Sayles,
637 S.W.2d 714 (Mo. App. 1982) 13
Sorensen v. Shaklee Corp.,
31 F.3d 638 (8th Cir. 1994) 24
Stoleson v. United States,
708 F.2d 1217 (7th Cir. 1983). 18
Sumitomo Bank v. Product Promotions, Inc.,
717 F.2d 215 (5th Cir. 1983) 23
Thompson v. Southern Pac. Transp. Co.,
809 F.2d 1167 (5th Cir.),
cert denied, 484 U.S. 819 (1987) 15, 19
Turpin v. Merrell Dow Pharmaceuticals, Inc.,
959 F.2d 1349 (6th Cir.),
cert. denied, 506 U.S. 826 (1992) 19
United States v. Brown,
501 F.2d 146 (9th Cir. 1974) 16
Viterbo v. Dow Chem. Co.,
826 F.2d 420 (5th Cir. 1987) 18, 19
Warner v. Goltra,
293 U.S. 155 (1934) 11
Zuchowicz v. United States,
140 F.3d 381 (2d Cir. 1998) 7

STATUTES AND RULES Page

Statutes:

28 U.S.C. § 1257(a) 2
28 U.S.C. § 1331(1) 2
45 U.S.C. § 51 ..... *passim*
46 U.S.C. § 688 ..... *passim*

Rules:

FED. R. CIV. EVID. 702 ..... 2, 24, 25
FED. R. CIV. EVID. 703 2
FED. R. CIV. P. 50(b) 4
TEX. R. CIV. EVID. 702 ..... 2, 24
TEX. R. CIV. EVID. 703 2
TEX. R. CIV. P. 301 4
TEX. R. CIV. P. 324(b) 26

Treatises:

PETER HUBER,
GALILEO'S REVENGE:
JUNK SCIENCE IN THE COURTROOM (1991) 27
PROSSER & KEATON ON TORTS (5th ed. 1984) 13

OTHER AUTHORITIES **Page**

Articles:

Hon. Peter Beer,
Keeping Up with the Jones Act,
61 TUL. L. REV. 379 (1986) 10, 20
F. Nash Bilisoly,
The Relationship of Status and Damages in Maritime Personal Injury Cases,
72 TUL. L. REV. 493 (1997) 11
Ugo Colella,
Comment, The Proper Role of Special Solicitude in the General Maritime Law,
70 TUL. L. REV. 227 (1995) 9, 22
Robert Force,
Allocation of Risk and Standard of Care Under the Jones Act: "Slight Negligence," "Slight Care"?,
25 J. MAR. L. & Com. 1 (1994).....7
Mason Ladd,
Expert Testimony,
5 Vand. L. REV. 414 (1952) 16
Paul D. McFarlane,
Mayday or All Ahead for Junk Science: Cella v. United States,
18 TUL. MAR. L.J. 149 (1993) 16
Richard W. Wright,
Causation in Tort Law,
73 CALIF. L. REV. 1735 (1985) 12

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Maritime Overseas Corporation, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Texas in this case.

OPINIONS BELOW

The opinion of the Texas Supreme Court, reprinted as Appendix A ("App. A"), is reported at 971 S.W.2d 402 (Tex. 1998), and its judgment is reprinted as Appendix B ("App. B"). The Texas Supreme Court's order denying petitioner's motion for rehearing is reported at 41 TEX. SUP. CT. J. 1028 (Tex. July 3, 1998), and is reprinted as Appendix C ("App. C"). The order of the Texas Supreme Court granting petitioner's application for writ of error is reported at 40 TEX. SUP. CT. J. 767 (Tex. July 9, 1997), and is reprinted as Appendix D ("App. D"). The order of the Texas Supreme Court that originally denied petitioner's application for writ of error is reported at 40 TEX. SUP. CT. J. 110 (Tex. Nov. 15, 1996), and is reprinted as Appendix E ("App. E"), along with Justice Nathan Hecht's opinion dissenting from that ruling, which begins on page E-2. The en banc opinion and judgment of the Fourteenth Court of Appeals, reported at 886 S.W.2d 780 (Tex. App.—Houston [14th Dist.] 1994), is reprinted as Appendix F ("App. F"). The unpublished panel opinion and judgment of the Fourteenth Court of Appeals is reprinted as Appendix G ("App. G"). The judgment of the 165th Judicial District Court of Harris County, Texas, reprinted as Appendix H ("App. H"), is unpublished, as is the decision of the trial court denying Petitioner's Motion for New Trial, which is reprinted as Appendix I ("App. I").

JURISDICTION

The judgment of the Texas Supreme Court was entered on April 16, 1998. Maritime's timely motion for rehearing, filed on May 4, 1998, was denied on July 3, 1998. *See* App. C-1. This petition has been filed within ninety days following denial of the motion for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). State court jurisdiction in this Jones Act case was invoked by respondent under the "saving to suitors" clause of 28 U.S.C. § 1331(1).

STATUTES INVOLVED IN THIS CASE

The following statutes are involved in this case and are reprinted in Appendix J ("App. J"): the Jones Act, 46 U.S.C. App. § 688(a), and the Federal Employers' Liability Act (FELA), § 1, 45 U.S.C. § 51. Appendix J also reprints Federal Rules of Evidence 702 and 703 and Texas Rules of Evidence 702 and 703.

STATEMENT

A. Background Facts

This case concerns a toxic tort in which the exposure occured while respondent was at sea aboard petitioner's vessel. In August 1982, respondent served as a steward's assistant on the vessel *S/T OVERSEAS ALASKA*. While the ship was at sea, the chief steward mistakenly sprayed undiluted diazinon aboard the ship.[1] When the steward's error was discovered, the captain ordered respondent to clean up the excess diazinon, but failed to provide protective gear to prevent inhalation and dermal contact. Afterwards, respondent complained of a headache, eye irritation, and a runny nose. He was treated at New Orleans General Hospital two days later when

---

[1] Diazinon is one of a widely-varying group of pesticides known as "organophosphates."

the ship docked. The examining physician concluded that respondent suffered from diazinon exposure, but that neither hospitalization nor an antidote was necessary. At the hospital, respondent had no complaints indicative of neurological impairment or nervous system disorder. The treating physician thus determined that respondent had not sustained neurological damage, and respondent was released after the examination. Respondent was found fit for duty, returned to work for petitioner, and served as a crew member through the end of 1982. Respondent was declared fit for duty again in March 1983.

B. Proceedings

1. The trial

In June 1983, respondent Richard Ellis sued petitioner Maritime Overseas Corporation in state court under the Jones Act and federal maritime law, claiming that he was injured by the exposure to diazinon. The Jones Act, 46 U.S.C. App. § 688(a), grants seamen rights equivalent to those of railway employees under the Federal Employers' Liability Act ("FELA"). It is well settled that FELA imposes the judicially-created "featherweight" burden of proof upon a plaintiff seeking to establish a causal connection between an employer's negligence and a particular *event*, which determines the employer's liability.

At trial, petitioner did not dispute that respondent was briefly exposed to diazinon, nor did it dispute liability for respondent's short-term injuries related to the acute effects of this exposure. In addition to his complaints related to the immediate effects of the exposure, however, respondent and his experts alleged that the one-time exposure to diazinon had caused a controversial neurological condition known as delayed neurotoxicity. Scientists disagree whether such a condition exists and, if it does, what causes it. To date, no medical study has linked diazinon with delayed neurotoxicity, and at least one published study has shown that diazinon and other types of organophosphates do *not* cause delayed

neurotoxicity. Moreover, the experts who acknowledge the condition agree that delayed neurotoxicity manifests itself from a week to, at most, a few months after the initial exposure. Significantly, many of the symptoms exhibited by respondent can be caused by alcohol abuse, and use of alcohol is regarded as a possible causative factor in testing for delayed neurotoxicity. The trial court, however, refused to admit evidence of respondent's alcohol abuse.

Despite the fact that the medical and scientific literature did not support their conclusion that acute exposure to diazinon caused respondent to develop delayed neurotoxicity, respondent's experts testified that his condition is irreversible. Objective medical evidence,[2] however, proved Ellis to be in normal health, apart from problems relating to obesity, high blood pressure, smoking, and alcohol dependency.

On April 29, 1991, Judge Ken Harrison of the 164th District Court of Harris County, Texas, rendered judgment on a jury verdict of more than $12.4 million in favor of respondent, which included $8.6 million in actual damages, $2 million in punitive damages, and $1,871,728 in prejudgment interest.[3] App. H-2-3. Petitioner filed motions for new trial, for judgment notwithstanding the verdict, or, in the alternative, for remittitur, arguing that respondent's evidence was scientifically unreliable and thus insufficient to support the damage award.[4] *See* App. K-2-7. The trial court denied Maritime's post-trial motions on July 16, 1991. App. I-1.

---

[2] By "objective medical evidence," petitioner refers to the results of respondent's EEGs, peripheral nerve tests, MRI, and CT-scan.

[3] The awards for punitive damages and prejudgment interest were reversed on appeal and are no longer at issue.

[4] Unlike the Federal Rules of Civil Procedure, the Texas rules do not require a party to move for judgment notwithstanding the verdict before submission of the case to the jury. *Compare* TEX. R. CIV. P. 301 *with* FED. R. CIV. P. 50(b).

2. The Court of Appeals

Petitioner appealed to the Fourteenth Court of Appeals for the State of Texas. On December 31, 1992, a three-justice panel of that court reversed the judgment of the trial court, finding the evidence insufficient to support the jury's findings on actual damages and remanding the entire case for a new trial. App. G-13. The panel reasoned that, under controlling federal precedent, respondent's experts had failed to demonstrate that diazinon can cause delayed neurotoxicity. *Id.* On respondent's motion, the court of appeals granted rehearing en banc. On July 28, 1994, a five-justice majority of the Fourteenth Court of Appeals reversed the panel's decision and affirmed the trial court's actual damage award. App. F-33. Responding to petitioner's argument that no well-founded scientific methodology supported the conclusions of respondent's experts, the en banc Fourteenth Court of Appeals found nothing in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)—decided two years *after* the trial of this case—that eliminates the "featherweight" burden of proof in a Jones Act case to establish negligence and causation. App. F-19.

3. The Texas Supreme Court

Petitioner appealed to the Texas Supreme Court. Petitioner's application for writ of error was denied on November 15, 1996, evoking a strong dissent from Justice Nathan Hecht. E-1; E-2. On July 9, 1997, however, the Texas Supreme Court considered petitioner's motion for rehearing and granted the application for writ of error on two issues: (1) whether the court of appeals erred by not using the proper standard to review the factual sufficiency of respondent's actual damages evidence; and (2) whether the court of appeals erred in failing to examine whether any well-founded scientific methodology supported the jury's actual damages award. App. D-1. On April 16, 1998, the Texas Supreme Court affirmed the decision of the court of appeals over the dissents of Chief Justice Phillips and Justice Hecht. App. A-2.

Addressing the first issue, the Texas Supreme Court speaks of a single causation burden for a Jones Act plaintiff, defining that burden as "'whether the proof justifies with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury for which the claimant seeks damages.'" App. A-5 (quoting *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 506-07 (1957)). The Texas Supreme Court found that "[t]he court of appeals followed applicable law when it analyzed Maritime's challenge to causation instead of damages . . . ." App. A-9.

The Texas Supreme Court declined to examine the second issue – the reliability of respondent's scientific evidence – holding that "[t]o preserve a complaint that scientific evidence is unreliable and thus, no evidence, a party must object to the evidence before trial or when the evidence is offered." App. A-11.

In sum, the federal issues have been the focus of this case from its beginning. Pursuant to Rule 14.1(g)(i), Appendix K reprints the most relevant excerpts from the briefs, motions, and memoranda filed by petitioner in the lower courts.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD CLARIFY THAT A JONES ACT PLAINTIFF MUST ESTABLISH TWO CAUSAL CONNECTIONS.

The Texas Supreme Court and the en banc court of appeals have misinterpreted the Jones Act with a result that commands attention and redress by this Court. This misconstruction further confuses an important area of federal law that, for many years, has been in urgent need of clarification from this Court.[5] Contrary

---

[5] Should anyone doubt that the body of law generated by the Jones Act is in dire need of attention, one need only attempt to parse its phraseology. Standards described variously by courts as "featherweight," "slight care," "slight duty," "slight duty to use

to the state court's cursory analysis, every personal injury plaintiff–Jones Act or otherwise–must establish two causal connections in order to recover: (a) a causal nexus between the defendant's conduct or "negligence" and a particular *event*; and (b) a causal nexus between that event and the plaintiff's *damages*. *See Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 731 (Tex. 1984).

> There is . . . no older requirement in . . . [tort] law than the need to show . . . a link between the defendant's actions and the plaintiff's loss. It long precedes the obligation to show that the defendant was at fault. *Along with the showing of injury,* causation constituted an essential part of what the plaintiff had to demonstrate for the early common law action in trespass to lie.

Zuchowicz v. United States, 140 F.3d 381, 383-84 (2d Cir. 1998) (emphasis supplied) (citing 17th century trespass actions, which, along with trespass *vi et armis* and trespass on the case, are regarded as the ancestor of the modern personal injury suit).

The Jones Act's featherweight burden of proof applies only to the first causal nexus,[6] which, in this case, has never been in

---

reasonable care," "slight negligence," "slightly negligent," "slightest negligence," "slight evidence of negligence," and "slight evidence of slight negligence" abound, without benefit of definition or delineation. *See, e.g., Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335-38 (5th Cir. 1997) (citing cases and holding that, due to statutory language, Jones Act mandates a duty of care of "ordinary prudence under the circumstances" for both employers and employees); *see also* Robert Force, *Allocation of Risk and Standard of Care Under the Jones Act: "Slight Negligence," "Slight Care"?*, 25 J. MAR. L. & COM. 1 (1994).

[6] The featherweight burden of proof arises from the statutory language of Section 51 of FELA, which provides that "every common carrier by railroad . . . shall be liable in damages . . . for

dispute. The second causal nexus, however, must be proved by the traditional and more stringent "preponderance of the evidence standard."[7] Nonetheless, apparently biased by an outmoded

---

such injury or death resulting *in whole or in part from the negligence of . . . such carrier."* 45 U.S.C. § 51 (emphasis supplied). The standards of liability and proof are the same for FELA and the Jones Act. *In re Hechinger,* 890 F.2d 202, 208 (9th Cir. 1989), *cert. denied,* 498 U.S. 548 (1990). A seaman is thus entitled to recovery under the Jones Act if his employer's negligence is the cause, in whole or in part, of his injury. *Gautreaux,* 107 F.3d at 335. Over time, courts replaced the phrase "in whole or in part" with the adjective "slightest." Historically, this Court has used the term "slightest" to describe the quantum of evidence of an employer's breach of duty necessary to sustain a jury verdict. *Id.* (citing *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506 (1957); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523 (1957)). The intended effect of the law is to strip the employer of his common-law defenses, such as assumption of the risk and contributory negligence as a complete bar to recovery. *Rogers,* 352 U.S. at 507-08.

[7] This is because FELA speaks only to the issue of liability. *See supra* note 6. As this Court explained in *Metro-North Commuter R.R. Co. v. Buckley,* 117 S. Ct. 2113 (1997), common-law principles "'are entitled to great weight'" in interpreting the Act, so long as those principles are not expressly rejected by the text of the statute. *Id.* at 2117 (quoting *Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532, 544 (1994)). In holding that a FELA claimant cannot recover unless and until he manifests symptoms of a disease, *the Buckley Court made no mention of the featherweight burden of proof,* for the obvious reason that FELA does not mandate a standard of proof on the issue of injury. *See id.* at 2116; *see also Gottshall,* 512 U.S. at 558 (noting that it is the Court's duty in interpreting FELA "to develop a federal common law of negligence . . . informed by reference to the evolving common law.") (Souter, J., concurring); *Atchison, Topeka & Santa Fe Ry. Co. v. Buell,* 480 U.S. 557, 568-70 (1987).

doctrine that favors the Jones Act claimant at any cost, the Texas Supreme Court examined respondent's proofs on this issue with an unwarranted degree of "special solicitude" and, consequently, reached an entirely unjust result.[8]

A. The paternalistic judicial deference given to Jones Act claimants arises from a gravely anachronistic doctrine.

Petitioner acknowledges that the Jones Act originally was intended as "welfare legislation," creating "new rights in seamen for damages," and, accordingly, "is entitled to a liberal construction to accomplish its beneficent purposes." *Cosmopolitan Shipping Co. v. McAllister,* 337 U.S. 783, 790 (1949); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248 (1952) ("[The Jones Act] is to be liberally construed to carry out its full purpose, which

---

[8] The term "special solicitude" first appeared in a general maritime contract case, but "plays its most important role on the tort side of the general maritime law." Ugo Colella, Comment, *The Proper Role of Special Solicitude in the General Maritime Law,* 70 TUL. L. REV. 227, 230 (1995) [hereinafter Colella, *Special Solicitude*]. The referenced contract case is *Hume v. Moore-McCormack Lines, Inc.*, 121 F.2d 336, 337 (2d. Cir.), *cert. denied,* 314 U.S. 684 (1941). Mr. Colella further notes:

> One of the most revered aspects of maritime law is the special status that courts have afforded those who make their living on the sea. Seamen, for example, were commonly referred to as "wards of the admiralty court"; courts, not statutes, traditionally protected them in the early to mid-nineteenth century. In the context of maritime personal injury and death, this doctrine expressed "special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages."

Colella, *Special Solicitude, supra* at 240 (citations omitted).

was to enlarge admiralty's protection to its wards."). While the goal of affording protection to "admiralty's wards" may be laudable, it was not intended to serve as a signal to the courts to abandon reason altogether.[9]

The courts' outmoded treatment of seamen is best exemplified by a single passage authored by Justice Story while sitting on circuit:

> Seamen are a class of persons remarkable for their rashness, thoughtlessness and improvidence. They are generally necessitous, ignorant of the nature and extent of their own rights and privileges, and for the most part incapable of duly appreciating their value. They combine, in a singular manner, the apparent anomalies of gallantry, extravagance, profusion in expenditure, indifference to the future, credulity, which is easily won, and confidence, which is readily surprised. Hence it is, that bargaining between them and shipowners, the latter being persons of great intelligence and shrewdness in business, are deemed open to much observation and scrutiny; for they involve great inequality of knowledge, of forecast, of power, and of condition. Courts of admiralty on this account are accustomed to consider seamen as peculiarly entitled to their protection; so that they have been . . .

---

[9] Judge Peter Beer of the U.S. District Court for the Eastern District of Louisiana argues that, once the "plaintiffs' personal injury bar realized the implications of *Gianfala* [*v. Texas Co.*, 350 U.S. 879 (1955)]," which "effectively shifted all power to determine federal jurisdiction, liability, and damages to law juries who were untrained in the intricacies of the law," "bigtime personal injury litigation came into being almost overnight." Hon. Peter Beer, *Keeping Up with the Jones Act*, 61 TUL. L. REV. 379, 391 (1986). "In the process, this boom so distorted the application of the Jones Act that it became unrecognizable to its drafters." *Id.*

> often said to be favorites of courts of admiralty. In a just sense they are so, so far as the maintenance of their rights, and the protection of their interests against the effects of the superior skill and shrewdness of masters and owners of ships are concerned.

Brown v. Lull, 4 F. Cas. 407, 409 (C.C.D. Mass. 1836) (No. 2018)[10]

Justice Story's paternalistic concerns seem astonishingly passé today. With the advent of aggressive seafarers' unions, sophisticated telecommunications, shipboard medical care, and technological improvements in the maritime industry, the need to protect seamen as "admiralty's wards" has been dramatically reduced. Nevertheless, under the guise of the Jones Act's featherweight burden of proof, the Texas Supreme Court has perpetuated these now-shocking stereotypes by blurring the distinction between the two requisite causal connections and refusing to hold a Jones Act plaintiff to the appropriate burdens.

B. The "featherweight" burden of proof applies only to the issue of the defendant's liability.

There is an urgent need to return to the clear language of FELA and remove the cloudy patina of reinterpretations and misinterpretations created over time: "A web of more than three hundred years of maritime common law, overlaid with periodic and reactionary statutory developments, has resulted in a clutter of definitions, actions, and remedies that often have no real mooring in practical maritime activity." F. Nash Bilisoly, *The Relationship of Status and Damages in Maritime Personal Injury Cases*, 72 TUL. L. REV. 493, 494 (1997). FELA's text mandates that the judicially-created featherweight burden of proof affect only the issue

---

[10] As late as 1934, Justice Cardozo referred to seamen as "ignorant and helpless" and "in need of protection against [themselves] as well as others." *Warner v. Goltra*, 293 U.S. 155, 162 (1934).

of the defendant's liability: "Every common carrier . . . shall be liable in damages . . . for such injury or death resulting *in whole or in part from the negligence of . . . such carrier.*" 45 U.S.C. § 51 (emphasis supplied). The Texas Supreme Court and countless others have misconstrued this seemingly innocuous passage.

Justice Cardozo attempted to offer a simple illustration of the distinction between negligence and causation more than seventy-five years ago, yet—as this case demonstrates—courts continue to confuse and obscure these fundamental concepts:

> We must be on our guard . . . against confusing the question of negligence with that of the causal connection between the negligence and the injury. A defendant who travels without lights is not to pay damages for his fault unless the absence of lights is the cause of the disaster.

Martin v. Herzog, 126 N.E. 814, 816 (N.Y. 1920).

The first causal nexus, or the nexus between the defendant's conduct and the event sued upon, relates to the *liability* portion of a plaintiff's cause of action, questioning whether the defendant should incur legal responsibility for the event upon which the suit is based. For example, in a negligence action, liability is established by proving that the defendant's negligence was the "proximate cause" of the event sued upon.[11] In a Jones Act case, however, the first

---

[11] The concept of proximate cause embodies principles that "are generally thought to be a necessary limitation on liability." *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 838 (1996); *see also* Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1737 (1996) ("In all of tort law, there is no concept which has been as pervasive and yet elusive as the causation requirement, which relieves a defendant of liability if his tortious conduct was not a cause of the plaintiff's injury."). The Jones Act has been inhospitable to traditional definitions of "proximate cause," even though the term continues to be used indiscriminately by some courts. In Jones Act

causal nexus, and the first nexus *only*, is subject to proof by the so-called featherweight standard.[12]

Whether the event sued upon caused the injury alleged by the plaintiff is an entirely separate matter. The second causal nexus, meaning the connection between the event sued upon and the plaintiff's particular injuries, relates strictly to the *damages* aspect of the plaintiff's case. Even when liability is admitted, as in this case, proof of the second causal connection is mandatory because a plaintiff is entitled to recover damages only for those injuries caused by the event made the basis of suit, and this connection "must be shown by competent evidence." *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 732 (Tex. 1984); *Smith v. Sayles*, 637 S.W.2d 714, 719 (Mo. App. 1982). Nonetheless, laboring under the misconception that the Jones Act precludes meaningful review, the Texas Supreme Court glossed over the scientific causation evidence to such an extent that it failed even to mention this hard and fast rule. The fact that this case arises under the Jones Act "cannot in any wise justify a failure . . . to afford the litigants the same meaure of review on the merits as in every other case." *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 509 (1957).

---

and FELA cases, the preferred standard is "producing cause." *See, e.g., Chisholm v. Sabine Towing & Transp.*, 679 F.2d 60, 62 (5th Cir. 1982). Neither the lack of a proximate cause standard nor the featherweight burden of proof means, however, "that defendant's fault must not be shown to be a cause—there must, *of course*, be a connection—it merely need not be *the* cause." *Id.* (first emphasis supplied). No matter how "egregious the legal fault, there is no cause of action for negligence . . . until there is '*actual* loss or damage resulting to the interests of another.'" *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1136 (5th Cir. 1985) (citing PROSSER & KEATON ON TORTS § 30 at 165 (5th ed. 1984)) (emphasis supplied).

[12] *See supra* notes 6 & 7.

Petitioner does not dispute that its negligent conduct—permitting undiluted diazinon to be sprayed aboard its vessel—caused the *event* giving rise to this litigation—respondent's exposure to the diazinon. With that admission concerning the first causal connection, the applicability of the featherweight burden of proof is at an end.

C. This Court should clarify that the second causal nexus must be proved by a preponderance of the evidence.

Petitioner has, however, *consistently* disputed the second causal nexus for the simple fact that respondent failed to establish even a tenuous link between the event—exposure to diazinon—and his alleged damages—impairment and medical expenses related to delayed neurotoxicity. Nonetheless, the jury's actual damages finding reflects the belief that such a link was in fact established. In order for that link to be established, however, the following syllogism would have to be valid: (1) some organophosphates can cause delayed neurotoxicity; (2) diazinon is an organophosphate; (3) diazinon, therefore, must cause delayed neurotoxicity. This is flawed reasoning at its essence: a conclusion that defies common sense and science, and which necessarily reflects entirely unsupportable inferences. Consequently, its bases should have been closely scrutinized by the Texas Supreme Court. "The focal point of judicial reivew is the reasonableness of the particular inference or conclusion drawn by the jury . . . ." *Sentilles v. Inter-Caribbean Shipping Corp.* 361 U.S. 107, 110 (1959).

In addition to its failure to question the soundness of the scientific proofs and their underlying methodology, the Texas Supreme Court apparently ignored the fact that in all personal injury cases, including Jones Act cases, the second causal nexus is subject to proof by the traditional and more stringent preponderance of the evidence standard. *See, e.g., Claar v. Burlington N. R.R.*, 29 F.3d 499, 503 (9th Cir. 1994) (holding that FELA plaintiffs must demonstrate causal connection between

negligence and injury); *cf. Thompson v. Southern Pac. Transp. Co.*, 809 F.2d 1167, 1168 (5th Cir. 1987) ("[W]e find a lack of substantial evidence to support the verdict [because plaintiff] did not introduce sufficient evidence at trial to establish a link of causation between his alleged exposure to dioxin . . . and the development of his porphyria."); *Diebold v. Moore McCormack Bulk Transp. Lines, Inc.*, 805 F.2d 55, 58 (2d Cir. 1986) ("[Jones Act] Plaintiff was required to prove by a *preponderance of the evidence* that . . . if the shipowner was negligent, such negligence proximately caused the plaintiff's injuries.") (emphasis supplied); *Sabine Towing*, 679 F.2d at 62 ("Nothing . . . impairs the principle that in Jones Act cases, cause, in fact, is still a necessary ingredient of liability."); *Peymann v. Perini Corp.*, 507 F.2d 1318, 1324 (1st Cir. 1974), *cert denied*, 421 U.S. 914 (1975) (same as *Sabine Towing*).

As other courts have noted, "causation is always a problem," whatever the standard, even, for example, when negligence per se is established. *See Reyes v. Vantage S.S. Co., Inc.*, 558 F.2d 238, 247 n.5 (5th Cir. 1977) (Hill, J., dissenting). Accordingly, the need for expert medical and scientific testimony increases exponentially with the complexity of the alleged injury, particularly in a toxic tort case.[13] The relaxed standard of proof on the issue of liability in a Jones

---

[13] The need for expert testimony illustrates another distinction between the two causal burdens in a personal injury case. In most cases, a layperson is perfectly capable of determining whether a defendant's conduct fell below the relevant standard of care and caused a particular event. *See, e.g., Salem v. United States Lines Co.*, 370 U.S. 31, 35-36 (1962) (holding that jury could visualize platform from which seamen fell from oral and photographic evidence without expert testimony on whether proper marine architecture required railings or other safety devices in such areas). Conversely, it almost always requires an expert with medical and scientific training to determine whether, in turn, the event sued upon was the medical or factual cause of a claimant's complex injuries, especially when an illness or injury can result from multiple factors, as in the case of respondent's alleged delayed neurotoxicity:

Act or FELA case does not in any way obviate the need for expert testimony on the issue of medical causation. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 539 (1994) (experts testified as to relationship between FELA respondent's on-the-job stress and subsequent breakdown); *Cella v. United States*, 998 F.2d 418, 420-23 (7th Cir. 1993) (seaman's expert testified that polymyositis-like condition was caused by shipboard trauma); *Moody v. Maine Cent. R. Co.*, 823 F.2d 693, 695-96 (1st Cir. 1987) (acknowledging featherweight burden of proof, but holding that FELA plaintiff needed expert testimony to prove his case); *Knowles v. Burlington N. R.R. Co.*, 856 P.2d 1352, 1355 (Kan. App. 1993) (expert testimony necessary to demonstrate that defoliant chemical caused FELA claimant's non-Hodgkins lymphoma). Moreover, as in any other personl injury case, "expert medical testimony requires a verifiable epidemiological or scientific background." Paul D. McFarlane, *Mayday or All Ahead for Junk Science:* Cella v. United

---

> There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the case.

United States v. Brown, 501 F.2d 146, 149 (9th Cir. 1974); Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952); *see also Knowles v. Burlington N. R. Co.*, 856 P.2d 1353, 1355 (Kan. App. 1993):

> [T]he connection between non-Hodgkins lymphoma and exposure to certain defoliants is not the kind of information that is elementary or of common knowledge. Therefore, without the help of expert opinion testimony, lay jurors would be incapable of forming a correct judgment.

Id.

States, 18 TUL. MAR. L.J. 149, 152 (1993) (citing *Hayes v. Raytheon*, 808 F. Supp. 1326, 1330 (N.D. Ill. 1992)).[14] The standard of proof in any type of case is irrelevant, however, if, as in the present case, a particular event *cannot* be the medical cause of an alleged illness.

D. The decision below and a significant number of Jones Act cases conflict with the "reasonable medical probability" standard.

In order to carry the burden on the second causal connection and prevail at trial, the plaintiff in a toxic tort case must present evidence *sufficient* to establish, by a "reasonable medical probability," that the alleged injury resulted from the exposure to the toxic substance. *See, e.g., Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1137 (5th Cir. 1984). A plaintiff cannot establish reasonable medical probability with speculative or conjectural expert testimony. *See Mayhew v. Bell S.S. Co.*, 917 F.2d 961, 964 (6th Cir. 1990) (disapproving of speculative medical testimony in Jones Act suits).

In the non-Jones Act context, tort law has long acknowledged the truism that conjecture cannot establish medical probability. *See, e.g., Insurance Co. of N. Am. v. Myers*, 411 S.W.2d 710, 713 (Tex. 1966) ("Causal connection . . . must rest in reasonable probabilities; otherwise, the inference that such actually did occur can be no more than speculation and conjecture."). "Reasonable probability . . . is determinable by consideration of the *substance* of the testimony of the expert witness and does not turn on semantics or the use by the witness of any particular term or phrase." *Id.* Without a valid underlying methodology, even a

---

[14] "Epidemiology attempts to define a relationship between a disease and a factor suspected of causing it . . . ." *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307, 311 (5th Cir.) (*Brock I*), *modified*, 884 F.2d 166 (5th Cir. 1989) (per curiam) (*Brock II*), *cert. denied*, 494 U.S. 1046 (1990).

qualified medical expert cannot create evidence of causation simply by repeating an incantation of "reasonable medical probability."[15] Because, sadly, "there is not much difficulty in finding a medical expert witness to testify to virtually any theory of medical causation short of the fantastic," *Stoleson v. United States*, 708 F.2d 1217, 1222 (7th Cir. 1983), "[c]ourts must critically evaluate the reasoning process by which the experts connect data to their conclusions in order . . . to consistently and rationally resolve the disputes before them." *Brock I*, 874 F.2d at 310.[16]

Testimony that an illness is "possible" as a result of an event cannot serve as the basis for recovery, because *"mere possibility does not meet the preponderance of the evidence standard." Gideon*, 761 F.2d at 1137 (emphasis supplied). For this reason, cases like the present one, which absolve Jones Act and FELA plaintiffs from proving their injuries by a reasonable medical probability, are wrongly decided. Other examples of such decisions include *Hines v. Consol. Rail Corp.*, 926 F.2d 262, 265-66 (3d Cir. 1991) (reversing summary judgment in favor of defendant despite plaintiff's dubious medical testimony in deference to "more lenient standard of negligence and causation"); *Boeing Co. v. Shipman*, 411 F.2d 365, 371 (5th Cir. 1969) (en banc) ("[T]he question of negligence and causation must be most liberally viewed."), *overruled on other grounds by Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc); *cf. In re Paoli R. Yard PCB Litig.*, 916 F.2d 829 (3d Cir. 1990) (reversing trial court's exclusion of "meta-analysis" data offered by plaintiff on causation issue), *cert. denied sub nom. General Elec. Co. v. Knight*, 499 U.S. 961 (1991).

---

[15] The most well-credentialed scientist in all the world can testify that the world is flat, but, clearly, such testimony does not make it true – even if the jury believes it. *See Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 421 (5th Cir. 1987).

[16] In *Brock II*, which modified *Brock I*, the failure to present statistically significant epidemiological proof that Bendectin causes limb reduction birth defects was fatal to the Brocks' case. 884 F.2d at 167.

Whether in the admissibility context or the sufficiency context, sound standards for the scrutiny of scientific and medical testimony have been established. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (holding that federal rules require scientific evidence to be reliable as well as relevant); *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir.) ("An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process."), *cert. denied*, 117 S. Ct. 73 (1996); *Claar v. Burlington N. R.R.Co.*, 29 F.3d 499, 500 (9th Cir. 1994) (affirming summary judgment for employer when plaintiffs failed to show causal connection between workplace injury and toxic exposure); *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349, 1352-53 (6th Cir.) (admonishing courts to take a "hard look" at the data underlying expert opinion testimony because of potential for "exaggeration and fraud"), *cert. denied*, 506 U.S. 826 (1992); *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106 (5th Cir. 1991) (closely scrutinizing expert's methodology), *cert. denied*, 503 U.S. 912 (1992); *Brock II*, 884 F.2d at 167 (requiring statistically significant epidemiological study for proof of medical causation), *cert. denied*, 494 U.S. 1046 (1989); *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 421 (5th Cir. 1987) (finding that sources underlying physician's testimony concerning toxic exposure lacked foundation and reliability); *Thompson v. Southern Pac. Transp. Co.*, 809 F.2d 1167, 1168 (5th Cir. 1987) (finding insubstantial evidence to support verdict because plaintiff did not establish a causative link between his exposure to dioxin and onset of porphyria). These decisions, and a number of others, accentuate the need for reliable scientific testimony in the context of complex toxic torts, whether in Jones Act suits or otherwise.

Science is science, whether on land or at sea. Diazinon either can cause delayed neurotoxicity, or it cannot. Its chemical properties are not malleable according to the environment. Unless the Jones Act mandates that scientific principles be abandoned altogether, the standard for proving that a particular injury is caused by toxic exposure cannot be different merely because the claimant

was at sea when the injury occurred. One cannot plausibly conclude otherwise on the eve of the twenty-first century.

E. The issue is important.

This case demonstrates the magnitude of the harm that can and will ensue when the Jones Act's featherweight burden of proof on the issue of *liability* is confused with the plaintiff's burden of proof on the issue of *damage*. Holding a Jones Act plaintiff to an impermissibly lax burden of proof on the latter—when coupled with the statutory advantage on the former—fosters unjust results that will recur inevitably and indefinitely if not rectified by this Court.[17] Moreover, when injuries are demonstrated solely by scientifically unreliable expert testimony, as demonstrated in Part II below, the error and injustice are compounded. The decision of the Texas Supreme Court in this case goes *beyond* transforming the Jones Act into a strict liability statute, and, by decimating the standard of proof for damages, allows for recovery regardless of the supporting evidence.

Dissenting from the initial denial of petitioner's application for writ of error to the Texas Supreme Court, Justice Nathan Hecht, after noting that the staggering amount of the damage award was itself a strong indication of the issue's importance, went on at some length about the broader significance of this case:

---

[17] Judge Beer estimated that the number of Jones Act suits filed between 1975 and 1985 within the geographic sweep of the Gulf Coast alone "ranges upward toward six figures." Hon. Peter Beer, *Keeping Up with the Jones Act*, 61 TUL. L. REV. 379, 400 (1986) (compiling figures from the United States District Courts for the Southern District of Alabama, the Northern District of Florida, the Eastern, Middle, and Western Districts of Louisiana, the Southern District of Mississippi, and the Eastern and Southern Districts of Texas. During that same period, more than thirteen thousand Jones Act cases were filed in a single district court in Louisiana. *Id.*

> The central legal issue [in this case]—what evidence is necessary to support liability in a toxic tort case—is unquestionably important to our jurisprudence. Each year [in Texas alone] the issue recurs in hundreds of cases involving millions of dollars.

App. E-2 (Hecht, J., dissenting). Of course, money alone does not make this case important. Ironically, larger principles of equity and fairness have been degraded under the guise of the Jones Act's "humanitarian" purpose. While courts must interpret the statute to take proper account of the harms suffered by a sympathetic individual plaintiff,

> *so they must consider the general impact, on workers as well as employers,* of the general liability rules they would thereby create. Here the relevant question concerns not simply recovery in an individual case, but the consequences and effects of a rule of law that would permit that recovery. And if the common law concludes that a legal rule permitting recovery here, from a tort law perspective, and despite benefits in some individual cases, would on balance cause more harm than good, and if we find that judgment reasonable, we cannot find that conclusion inconsistent with the FELA's humanitarian purpose.

Buckley, 117 S. Ct. at 2121 (referring to FELA) (emphasis supplied).

Despite the fact that modern-day seamen are rarely more than a day away from sophisticated medical care, and despite the fact that the abhorrent conditions inspiring passage of the Jones Act have been significantly alleviated, employers remain at a distinct disadvantage in Jones Act litigation. If a claimant can recover fantastic sums solely on the basis of unadulterated speculation because that speculation is uttered by a well-credential "expert," a distinct disadvantage becomes almost certain defeat,

which *is* inconsistent with the Jones Act's humanitarian purpose and all rules of reason.

When the Texas Supreme Court's abrupt analysis in this case is contrasted with its careful analyses of causation in other personal injury and toxic tort cases, *see, e.g., Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497 (Tex. 1995); *Compugraphic*, 675 S.W.2d at 731, it is evident that the court's offhand treatment in this case is the result of its preoccupation with the featherweight burden of proof and its refusal to distinguish between the two causal connections – only one of which is addressed in the language of FELA. But this Court has cautioned that "admiralty court[s] should look primarily to . . . legislative enactments for policy guidance." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990). While statutory remedies for seamen may be supplemented,

> [courts] must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. *These statutes both direct and delimit our actions.*

Id. (emphasis supplied).

Nothing in the language of the Jones Act or FELA indicates that Congress intended a Jones Act claimant to recover for an injury that cannot be proved by competent medical evidence. "Special solicitude," however benevolent its origins, was "surely not designed to permit . . . judges to roam the vast wonderland of possible rights and remedies that promote 'justice.'" Colella, *Special Solicitude*, 70 TUL. L. REV. at 270.

II. THE RIGIDITY OF THE TEXAS SUPREME COURT'S RULING WRENCHES *DAUBERT* FROM ITS MOORINGS AND INSULATES SPECULATIVE EXPERT TESTIMONY.

The Texas Supreme Court reads *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to preclude *all* scrutiny of expert testimony once the question of admissibility is resolved. Thus, because petitioner did not contest the admissibility of respondent's expert testimony at trial, the Texas Supreme Court found the scientific methodology underlying that testimony immune from review. App. A-11-15. The court reasoned that "[w]ithout requiring a timely objection to the reliability of the scientific evidence, the offering party is not given an opportunity to cure any defect . . . and will be subject to trial and appeal by ambush."[18] App. A-11 (citing *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066-67 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 942 (1997); *Sumitomo Bank v. Product Promotions, Inc.*, 717 F.2d 215, 218

---

[18] The dissent, however, took grave exception to this argument, noting that:

> Maritime Overseas' position has *always* been—in its opening statement, its extensive examination of the expert witnesses, its closing argument, its motion for new trial, and throughout the appellate process—that no reliable scientific evidence shows that diazinon can cause long-term neurotoxicity. As [respondent's] attorney told the jury in his opening statement, [petitioner's] "position is that this chemical just cannot cause an injury to a worker's nervous system." [Petitioner's] position has *never* been in doubt.

App. A-22-23. (Hecht, J., dissenting) (emphasis supplied). Considering the sheer duration and dogged consistency of petitioner's argument on this issue, "trial by ambush" is a surprising and hollow argument.

(5th Cir. 1983)). There are two fatal defects in the Texas Supreme Court's view. The first is that the court has ignored this Court's admonition in *Daubert* against "wholesale exclusion." *See* 509 U.S. at 596. The soundness of this Court's warning is particularly well-taken because it envisions cases like this one, in which a claimant sustains *some* injury and offers adequately credentialed experts. The second defect is that the Texas Supreme Court's draconian interpretation of *Daubert* admits of *no* instance in which the sufficiency of the evidence can be challenged unless preceded by an objection to its admissibility.

A. Texas has adopted all federal standards for expert testimony.

In *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995), the Texas Supreme Court adopted *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and specifically embraced *Daubert's* holding that expert testimony must be relevant to the issues in a case and based upon a reliable foundation in order to be admissible under Federal Rule of Evidence 702.[19] The *Robinson* court adopted not only the relevancy and reliability components of *Daubert*, but also the factors that a trial court should consider in making its preliminary determination as to the admissibility of expert testimony. *Robinson*, 923 S.W.2d at 557. Further, as evidenced by its citation to federal decisions amplifying the *Daubert* decision, the *Robinson* court adopted the federal interpretations of that case as well. *See id.* at 559 (citing *Claar*, 29 F.3d at 502-03; *Sorensen v. Shaklee Corp.*, 31 F.3d 638 (8th Cir. 1994)).

---

[19] Just as it adopted *Daubert* whole cloth, Texas adopted the evidentiary rule upon which this Court's decision was based. *Compare* TEX. R. CIV. EVID. 702 *with* FED. R. EVID. 702. (Both are reprinted in Appendix J.) The only difference between Texas Rule of Civil Evidence 702 and its federal counterpart is that the federal rule contains a comma that the Texas rule omits. The omission has no bearing on the meaning of the rule.

Having adopted *Daubert*, however, the Texas Supreme Court misread the decision—and then felt compelled to follow its misinterpretation to reach a result that is inconsistent both with *Daubert* and its own pre-*Daubert* decisions. *See, e.g.*, *Schaefer v. Texas Employers' Ins. Ass'n*, 612 S.W.2d 199 (Tex. 1980); *Dallas Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377 (Tex. 1956); *Henry v. Phillips*, 151 S.W. 533 (Tex. 1912). This Court should correct the Texas Supreme Court's misunderstanding of the federal rule,[20] thus freeing that court to follow its prior jurisprudence and dictate the appropriate standard for review of the sufficiency of the unreliable expert testimony on which the jury relied in this case.

B. The rules of evidence and *Daubert* disfavor wholesale exclusion of expert testimony, sanctioning traditional remedies for attacking "shaky but admissible" expert testimony.

In *Daubert*, this Court was faced with the question of the *admissibility* of expert evidence. 509 U.S. at 585. Rejecting the rigid "general acceptance" standard announced in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), the Court sanctioned a reversal of the judgment for insufficient evidence of causation "rather than wholesale exclusion under an uncompromising 'general acceptance' test," noting that devices such as "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" are "traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596. As additional protection, courts remain free to direct a judgment or grant summary judgment. *Id.* "These conventional devices . . . are the appropriate safeguards where the basis of scientific testimony meets the standards of [Federal] Rule [of Evidence] 702." *Id.* Because

---

[20] *Daubert* issues are already before this Court in *Kumho Tire Co. v. Carmichael* (No. 97-1709). Perhaps the *Carmichael* decision itself will provide the necessary clarification here, and, thus, the Court may wish to hold this case for *Carmichael*.

it is silent as to whether these "conventional devices" preserve error, however, *Daubert* remains prone to recurring misinterpretation, as evidenced by the Texas Supreme Court opinion, the en banc opinion, and a number of misguided federal decisions. *See, e.g., Maritime v. Ellis*, 886 S.W.2d 780 (Tex. App.—Houston [14th Dist.] 1994), *reprinted at* App. F; *Babbitt*, 83 F.3d at 1066. Until this Court clarifies that scientific evidence is subject to both admissibility *and* sufficiency review, these misinterpretations will continue.

As the facts of this case illustrate, there are clear instances when a challenge to the sufficiency of the evidence is appropriate without regard to its admissibility. Whether the analogy is to moving a football down the field toward the goal line or to building a wall brick by brick, prevailing in a civil trial consists of proving one's case in stages. A plaintiff either makes it past the fifty-yard line with his evidence, or he does not. Until he rests his case, his opponent has no way of knowing whether his evidence will carry him far enough.[21] The Texas Supreme Court's requirement that trial counsel be clairvoyant is an affront to this Court's sound instruction and to the liberal approach of the federal rules concerning the admission of expert testimony. The Court's clarification that the "conventional devices" sanctioned in *Daubert* can preserve error for a challenge to the weight of the evidence will eliminate continued misinterpretation.

C. The issue is important.

In Justice Hecht's 1996 dissent to the initial denial of petitioner's application for writ of error, he observed that *Daubert* issues are debated nationally by courts and commentators, citing several Fifth Circuit cases in which the reliability of expert

---

[21] This fact is amply demonstrated by the Texas rules of procedure, which state that a complaint concerning the factual insufficiency of the evidence is preserved for appeal so long as it has been raised in a motion for new trial. TEX. R. CIV. P. 324(b).

testimony has been challenged.[22] *See* App. E-2-3. His observation is no less true today. There are entire publications devoted to *Daubert* and its progeny, and this case alone has generated a number of articles in such publications. *See, e.g.*, Jane Elliott, *A Conservative Court Discovers Moderate State of Mind*, TEXAS LAW., July 13, 1998, at 1; Angela Ward, *High Court Takes Easy Way Out in Scientific Evidence Case*, TEXAS LAW., Apr. 27, 1998, at 6; Maritime Overseas Corp. v. Ellis: *Texas Supreme Court Rejects* Daubert *Challenge as Untimely*, TOXIC CHEMICALS LITIG. REP., Apr. 27, 1998, at 25623; *Texas High Court Affirms $8.57 Million Judgment for Diazinon Exposure*, MEALEY'S LITIG. REP.: EMERGING TOXIC TORTS, Vol. 5, No. 17, Apr. 24, 1998, n.p.; Jane Elliott, *Too Late?*, TEXAS LAW., Nov. 10, 1997, at 6; *Texas Supreme Court Grants Writ on Expert Testimony Issues in Pesticide Case*, MEALEY'S LITIG. REP.: EMERGING TOXIC TORTS, Vol. 6, No. 10, Aug. 22, 1997, n.p.; *Texas Justice Rips Majority for Failure to Review* Ellis, MEALEY'S LITIG. REP.: EMERGING TOXIC TORTS, Vol. 5, No. 17, Dec. 13, 1996, n.p.. *Daubert* issues in other jurisdictions are no less prominent and controversial. *See* Daubert *Challenge Cannot be Raised First Time on Appeal;* MEALEY'S DAUBERT REP., Dec. 1997, n.p.

The tortured procedural history of this case also reflects the magnitude of the issues involved and the need for this Court's intervention. As Texas Supreme Court Justice Nathan Hecht stated in his dissent from the initial denial of petitioner's application for writ of error in that court:

---

[22] Justice Hecht referred to *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307, 310 (5th Cir.), *modified on reh'g*, 884 F.2d 166 (5th Cir. 1989) (per curiam), *cert. denied*, 494 U.S. 1046 (1990), and *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106 (5th Cir. 1991), *cert. denied*, 503 U.S. 912 (1992), which articulate standards for ascertaining the reliability of scientific testimony in keeping with *Daubert*, as well as the controversial work of Peter Huber, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM (1991).

> This case has engendered dissents and conflicts in the courts of appeals. The appellate court panel's 2-1 opinion . . . was reversed by the court en banc, 5-2. The court['s] decision conflicted with a unanimous panel opinion of another court. The latter opinion was itself reversed by the other court en banc, 5-1.

App. E-3. Moreover, after the Texas Supreme Court originally denied the application for writ of error, it reversed itself, granting petitioner's motion for rehearing and granting the application for writ of error. App D-1. The majority opinion provoked a spirited dissent authored by Justice Hecht and joined by Chief Justice Phillips, which the majority, in turn, addressed in its opinion. App. A-15 ("Response to the Dissent"). In sum, this case—standing alone—has generated heated controversy from opening statements through the denial of the motion for rehearing in the Texas Supreme Court. Moreover, its outcome affects Jones Act employers not only in Texas, but throughout the United States. In the words of Judge Hand, the Texas Supreme Court's excursion into maritime law has rendered a result that is "not only unwarranted in law, but unsanctioned in morals." *Kelcey v. Tankers Co.*, 217 F.2d 541, 548 (2d Cir. 1954) (Hand, J., dissenting in part).

CONCLUSION

The petition should be granted.

Respectfully submitted,

THOMAS B. GREENE III
Counsel of Record
WARE, SNOW, FOGEL,
JACKSON & GREENE, P.C.
1111 Bagby, 49th Floor
Houston, Texas 77002
(713) 659-6400

JOE R. GREENHILL
BAKER & BOTTS, L.L.P.
98 San Jacinto Blvd.
Austin, Texas 78701
(512) 322-2517
Of Counsel

LINDA BROOCKS
SALLY MANN ROMANO
OGDEN, GIBSON, WHITE
& BROOCKS, L.L.P.
2100 Pennzoil South Tower
711 Louisiana
Houston, Texas 77002
(713) 844-3000
Counsel for Petitioner

SEPTEMBER 1998